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Extencicare Health Facilities, Inc. d/b/a Crestwood Convalescent Center and United Food and Commercial Workers Local 381, affiliated with United Food and Commercial Workers International Union, AFL-CIO-CLC. Case 19-CA-26393

May 6, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

Pursuant to a charge filed on March 11, 1999, the General Counsel of the National Labor Relations Board issued a complaint on March 19, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 19-RC-13707. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, with an additional defense, admitting in part and denying in part the allegations in the complaint.

On April 5, 1999, the General Counsel filed a Motion for Summary Judgment. On April 6, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding. The Respondent states as a defense that all the registered nurses and licensed practical nurses employed in the bargaining units purportedly certified by the NLRB are supervisors within the meaning of Section 2(11) of the Act and it is under no obligation to recognize or bargain for such individuals in these units.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this un-

fair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Further, the Respondent's reliance on the decisions of the Third, Fourth, and Sixth Circuits in charge nurse cases fails to acknowledge that the Board's position on the supervisory status of nurses has been upheld by the Seventh, Eighth, Ninth, and District of Columbia Circuits. *NLRB v. Audubon Health Care Center*, 170 F.3d 662 (7th Cir. 1999) (en banc); *Lynwood Health Care Center v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enf. 323 NLRB No. 200 (July 3, 1997) (not reported in bound volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enf. 322 NLRB No. 54 (Oct. 15, 1996) (not reported in bound volumes); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 547 (9th Cir. 1997), enf. 321 NLRB No. 100 (July 10, 1996) (not reported in bound volumes).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a State of Delaware corporation, with a convalescent center in Port Angeles, Washington, where it is engaged in providing patient and health care services.

The Respondent, during the 12-month period preceding issuance of the complaint, which period is representative of all material times, in the course and conduct of its business operations, had gross sales of goods and services valued in excess of \$250,000, and purchased and caused to be transferred and delivered to its facility within the State of Washington goods and materials valued in excess of \$5000 which originated outside the State.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the elections held December 23, 1998, the Union was certified on January 6, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate units:

UNIT A:

All employees of the Employer at its Port Angeles, Washington, facility employed as licensed practical nurses, dietary aides, cooks, housekeepers, laundry employees, maintenance employees, activities employees, medical records clerks, nursing clerks, supply clerks, certified nursing assistants, nourishment aides, environmental aides, case mix coordinator, rehabilita-

tion aides and registered nursing assistants; excluding professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

UNIT B:

All registered nurses employed by the Employer at its Port Angeles, Washington, facility; excluding all non-professional employees, technical employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative of the units under Section 9(a) of the Act.

B. Refusal to Bargain

About February 26, 1999, the Union, by letter, requested the Respondent to bargain, and, since about March 2, 1999, the Respondent has failed and refused. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after March 2, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate units, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Extendicare Health Facilities, Inc. d/b/a Crestwood Convalescent Center, Port Angeles, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Local 381, affiliated with United Food and Commercial Workers International Union, AFL-

CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining units.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

UNIT A:

All employees of the Employer at its Port Angeles, Washington, facility employed as licensed practical nurses, dietary aides, cooks, housekeepers, laundry employees, maintenance employees, activities employees, medical records clerks, nursing clerks, supply clerks, certified nursing assistants, nourishment aides, environmental aides, case mix coordinator, rehabilitation aides and registered nursing assistants; excluding professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

UNIT B:

All registered nurses employed by the Employer at its Port Angeles, Washington, facility; excluding all non-professional employees, technical employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Port Angeles, Washington, copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2, 1999.

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 6, 1999

Sarah M. Fox,	Member
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Wilma B. Liebman,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER BRAME, dissenting.

In the underlying representation proceeding, I dissented from the denial of the Employer's request for review of the Regional Director's Decision and Direction of Election in which he found that the Employer's registered nurses and licensed practical nurses were not supervisors within the meaning of the Act. For reasons set out in my dissent in *Troy Hills Nursing Home*, 326 NLRB No. 159 (Sept. 30, 1998), I dissented there. The issues presented are significant and warrant careful consideration by the Board. Accordingly, and in light of the close scrutiny given by the courts of appeal to the Board's decisions in this area, simply granting summary judgment is not an adequate substitute for the Board's full and careful examination of the record through a grant of review in the underlying representation case.

Dated, Washington, D.C. May 6, 1999

J. Robert Brame III,	Member
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NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food and Commercial Workers Local 381, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining units.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining units:

UNIT A:

All employees at our facility employed as licensed practical nurses, dietary aides, cooks, housekeepers, laundry employees, maintenance employees, activities employees, medical records clerks, nursing clerks, supply clerks, certified nursing assistants, nourishment aides, environmental aides, case mix coordinator, rehabilitation aides and registered nursing assistants; excluding professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

UNIT B:

All registered nurses employed by us at our facility; excluding all non-professional employees, technical employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

EXTENDICARE HEALTH FACILITIES, INC. D/B/A
CRESTWOOD CONVALESCENT CENTER